Supreme Court of the United States

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,
PETITIONER

vs.

ALAN V. RASH, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF TEXAS

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[fol. 1]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

No. A10104

SERGEANT HERBERT N. CARRINGTON, RELATOR

vs.

ALAN V. RASH, ET AL, RESPONDENTS

[File Endorsement Omitted]

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS—
filed April 13, 1964

TO THE SUPREME COURT OF TEXAS:

Comes now Relator, SERGEANT HERBERT N. CARRINGTON, a resident of the City of El Paso, State of Texas, complaining of the following respondents: ALAN V. RASH, MARGARET HOCKENBERRY and WAGGONER CARR, and respectfully hereby moves this Honorable Court to grant to the Relator leave to file his Petition for the Writ of Mandamus, herewith tendered, said Petition being hereby referred to and made a part of this Motion for all purposes. Accompanying this motion, Relator herewith deposits with the Clerk the sum of Fifteen Dollars as costs and stands ready to deposit an additional sum, all as required by the Rule of the Court.
[fol. 2] Relator prays that said Petition for Mandamus be filed and that the same be set down for hearing, and for relief, general and special.

Respectfully submitted,

PETICOLAS, LUSCOMBE & STEPHENS
Suite 12-E
El Paso National Bank Building
El Paso 1, Texas

By: Wayne Windle
Attorneys for Relator

[fol. 3] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 4]

[File Endorsement Omitted]

[fol. 5]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

[Title Omitted]

PETITION FOR WRIT OF MANDAMUS—filed April 15, 1964

TO THE HONORABLE SUPREME COURT:

SERGEANT HERBERT N. CARRINGTON, hereinafter called Relator, complaining of ALAN V. RASH, MARGARET HOCKENBERRY and WAGGONER CARR, hereinafter called Respondents, for cause of action respectfully represents to the Court the following facts:

I

Alan V. Rash is the Chairman of the Republican Party Executive Committee of El Paso County, Texas. In compliance with the requirements of V.A.T.S. Election Code [fol. 6] art. 301 (d) Alan V. Rash has duly appointed Margaret Hockenberry as a "presiding judge". Acting as such "presiding judge", Margaret Hockenberry, in accordance with the authority conferred upon her by the Election Code, will, on May 2, 1964, conduct the Republican Party Primary Election in Precinct No. 16 of El Paso County, Texas. Waggoner Carr is the Attorney General of the State of Texas.

II

Relator is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of

Jefferson County, Alabama, and he has been continuously in the military service since that time.

III

Relator was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Relator presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age. Both children attend the public schools in El Paso County, Texas.

IV

Relator has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the re- [fol. 7] mainder of his life. Relator is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Relator has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas.

V

Relator has paid ad valorem taxes and will pay such taxes in the future to the City of El Paso, Texas, and to the County of El Paso, Texas. Relator, in paying his Federal income taxes, has shown on his return that he resides at 3408 Sirius Drive, El Paso, Texas. He has also purchased his automobile license plates in El Paso County, Texas.

VI

Relator recently purchased a small business which was located in Las Cruces, New Mexico. He has moved the

business to El Paso County where he plans to conduct it on a partnership basis.

VII

On December 17, 1963, Relator paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such payment, Relator received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. He presently holds the poll tax receipt which correctly shows that he [fol. 8] was 35 years of age at the time he paid the tax; that he resides at 3408 Sirius Drive, which is in Precinct No. 16 of El Paso County; that he was born in Alabama; that he is a white, male citizen of the United States; that he has lived in El Paso, El Paso County, Texas, for at least two years; that his occupation is the United States Army. A copy of said poll tax receipt is attached to this Petition and made a part hereof for all purposes. It is labeled "Exhibit A".

VIII

On March 18, 1964, Relator through his attorney, Wayne Windle, wrote a letter to Respondent Alan V. Rash, asking said Respondent whether or not Relator would be allowed to vote in the Republican Party Primary Election to be held on May 2, 1964. Respondent Rash, in his capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, in her capacity as presiding judge of Precinct No. 16, El Paso County, Texas, answered by letter dated March 23, 1964, that Relator would not be allowed to vote in said election. By said letter from Respondent Rash, the Respondents Rash and Hockenberry have emphatically stated that they will refuse to allow Relator to vote in said election. The letter written by the said Wayne Windle to Respondent Rash, and the letter in reply thereto from Respondent Rash are both attached to this Petition and made a part hereof for all purposes, and are labeled "Exhibit B" and "Exhibit C" respectively.

[fol. 9]

IX

By said letter from Respondent Rash to attorney Wayne Windle, Respondents Rash and Hockenberry have admitted that Relator holds a valid poll tax receipt which states on its face that it is to be used for voting in the year 1964. Respondents Rash and Hockenberry have also admitted that said poll tax receipt correctly reflects all of the facts about him which are set forth in paragraph VII of this Petition. Despite the fact that Relator has shown to the satisfaction of Respondents that he holds a valid poll tax receipt and that he meets all of the age and residence requirements for a qualified elector in El Paso County, Texas, said Respondents have refused and will continue to refuse to recognize Relator as a qualified voter solely because he is a member of the United States Army and because he did not reside in El Paso County when he entered the service in 1946.

X

The only reason for the Respondents' refusal to recognize Relator as a qualified voter is that the Attorney General of the State of Texas, in Opinion C-173, dated November 6, 1963, concluded that the following constitutional provision is applicable to members of the Armed Forces who resided outside of the State of Texas at the time they entered the military service:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may
[fol. 10] "vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces." Article VI, Section 2, Constitution of the State of Texas.

Because of the Opinion referred to above, Waggoner Carr, the Attorney General of the State of Texas, is an interested party to this action and has, therefore, been named as a Respondent herein.

XI

As is pointed out in Relator's brief, Relator first contends that the Attorney General's interpretation of the above quoted constitutional provision is incorrect. Secondly, Relator contends that said constitutional provision is subject to more than one reasonable interpretation, and, therefore, it should be liberally construed in favor of Relator's right to vote. Thirdly, if the Attorney General's interpretation is correct, Relator contends that such provision has the effect of depriving Relator of his right to become a qualified voter in any national, state or local elections in the United States of America so long as he remains a member of the Armed Forces and resides in Texas, and, therefore, said provision violates the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

XII

Relator has a right to have the Respondents determine whether or not he is a qualified elector in El Paso [fol. 11] County, Texas, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Relator has a right to establish a voting residence in Texas. Relator has a right to become a qualified voter in Texas without resigning or retiring from the military service. Relator is a qualified voter under the laws of the State of Texas, and particularly so under Article VI of the Texas Constitution and Articles 5.01 and 5.02 of the Texas Election Code. Relator has a right to vote in the Republican Party Primary Election to be held on May 2 of this year. He has a right to cast his ballot in such election in Precinct No. 16 of El Paso County, Texas.

XIII

Respondents have refused to recognize Relator's right to vote in said election. In continuing to refuse to recognize Relator's right to vote because he is a member of the United States Army and resided in Alabama when he entered the military service, Respondents are violating

their duties under the laws of the State of Texas. Respondents owe a duty to Relator to determine whether or not he is a qualified elector in El Paso County, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Respondents owe a duty to Relator to recognize that Relator can establish a voting residence in Texas. Respondents owe a duty to Relator to [fol. 12] recognize that Relator can become a qualified voter in Texas without resigning or retiring from the military service. Under the laws of this state, it is the duty of the Respondents to allow Relator to vote in Precinct No. 16 in El Paso County, Texas, in the Republican Party Primary Election to be held on May 2, 1964.

XIV

Relator avers that unless this Court issues a Writ of Mandamus as herein prayed for, he has no adequate remedy at law or in equity to enable him to vote in the Republican Party Primary Election to be held on May 2 of this year.

WHEREFORE, premises considered, Relator respectfully prays that this Petition for Writ of Mandamus be set down for hearing and that upon hearing hereof, a Writ of Mandamus issue ordering and commanding Respondents to determine whether or not Relator is a qualified elector to vote in said election without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama, and Relator prays that said Writ of Mandamus further order that after such determination, Respondents shall allow Relator to vote in such election provided he shows himself to be otherwise qualified to vote.

Relator further prays that upon hearing of this Petition, that a Writ of Mandamus issue ordering and commanding Respondents not to refuse to recognize Relator as a qualified voter because he is a member of the United States Army, and because he did not reside in El Paso [fol. 13] County when he entered the military service.

Relator further prays that upon hearing of this Petition, that a Writ of Mandamus issue ordering and commanding Respondents not to prevent Relator from voting in said election for the reason that he is a member of the United States Army or for the reason that he resided in Alabama when he entered the military service.

Relator prays for such other and further relief to which he may be entitled.

Respectfully submitted,

PETICOLAS, LUSCOMBE & STEPHENS

/s/ Wayne Windle
Attorneys for Relator

[*Duly sworn to by Sergeant Herbert N. Carrington jurat omitted in printing (all in italics)*]

[fol. 14]

EXHIBIT "A" TO PETITION

THIS RECEIPT FOR VOTING IN THE YEAR 1964 EXHIBIT "A" to Petition

ORIGINAL
1963

POLL TAX RECEIPT

STATE OF TEXAS, COUNTY OF EL PASO No. 1431

Date 17 Dec 19 63

RECEIVED OF Herbert A. Carrington

Precinct No.		YEARS
16	Age	35
	State	2
	County	1
	City	1

Address 3408 Sierra Dr

Occupation U.S. Army

Born at Alabama

WHITE
COLORED

MALE
~~FEMALE~~

(Native Born) Naturalized Citizen of the United States

Party Affiliation
To Be Stamped By Election Official

the Sum of One and 75/100 Dollars in payment of Poll Tax for the year, A.D. 1963. The said Tax Payer being duly sworn by me says that the above is correct. All of which I certify.

By B. Vinson Deputy.

R. R. DEASON
Assessor and Collector of Taxes, El Paso County, Texas

[fol. 15] EXHIBIT "B" TO PETITION

LAW OFFICES
PETICOLAS, LUSCOMBE AND STEPHENS
EL PASO NATIONAL BANK BLDG.
EL PASO 1, TEXAS

532-3683
542-1981

W. C. PETICOLAS
JOHN B. LUSCOMBE, JR.
GROVER L. STEPHENS
MARK HOWELL
WAYNE WINDLE

OF COUNSEL
W. H. FRYER

March 18, 1964

Mr. Alan V. Rash
Chairman of the Executive Committee
of the Republican Party for El Paso County
First National Building
El Paso, Texas

Dear Mr. Rash:

Our firm represents Sgt. Herbert N. Carrington, who is a member of the United States Army. Sergeant Carrington would like to know whether or not he will be allowed to vote in the Republican Primary election to be held on May 2nd of this year. In determining whether or not he will be allowed to vote in such election, please consider the following facts:

> Sergeant Carrington resided in Bessemer, Alabama, in 1946 when he entered the military service. Sergeant Carrington has resided in El Paso County, Texas, since February of 1962. He owns his home at 3408 Sirius Drive, El Paso, Texas. He recently purchased a small business which he plans to operate as a partnership here in El Paso County. Since February of 1962 he has considered El Paso, Texas, as his home for all purposes. Sergeant Carrington has a valid El Paso County poll tax receipt to be used for voting in the year 1964. The receipt shows

that he was born in Alabama, that he is 35 years of age, and that he has resided in El Paso County, Texas, for more than two years. The receipt further shows that he resides in Precinct No. 16 of El Paso County, Texas, and that his occupation is the United States Army.

If Sergeant Carrington presents his poll tax receipt to the Republican Party election officials on duty at Precinct No. 16 on May 2, during the hours that the polls are open for voting and, if at such time, he satisfies the election officials that the above-stated facts about him are true, will he be allowed to vote in the Republican Primary election being held on that date?

[fol. 15a] We will certainly appreciate any information which you can give us concerning Sergeant Carrington's voting privileges.

Sincerely yours,

WAYNE WINDLE

WW:MJR

[fol. 16] EXHIBIT "C" TO PETITION

EL PASO COUNTY REPUBLICAN PARTY

ALAN V. RASH
CHAIRMAN, EXECUTIVE COMMITTEE
1305 FIRST NATIONAL BLDG.
TELEPHONE 533-3494
EL PASO 1, TEXAS

March 23, 1964

Mr. Wayne Windle
Attorney at Law
El Paso National Bank Building
El Paso, Texas

RE: Voting Rights of Sergeant
Herbert N. Carrington

Dear Mr. Windle:

I have received and carefully considered the letter from you of March 18, 1964, wherein you ask if Sergeant Herbert N. Carrington of 3408 Sirius Drive, El Paso, Texas, may vote in the Republican Primary Election on May 2, 1964, in Precinct No. 16 of this County. I have conferred in this matter with Mrs. Harold L. (Margaret) Hockenberry, the Election Judge in Precinct No. 16. She was appointed by me on March 17, 1964, to act as such Judge in the polling place for the Republican Primary Election. In your letter you have set out certain facts concerning Sergeant Carrington's military status, place of residence, and other qualifications as a requirement to vote, and inquire as to whether he would be considered a qualified elector.

It is my opinion, as Chairman of the Republican Party Executive Committee for El Paso County, that Sergeant Carrington will be unable to vote in the Republican Primary Election on May 2, of this year. Mrs. Hockenberry, as Election Judge, has joined with me in this opinion. However, our opinion is tendered with regret for Sergeant Carrington's position. We have no choice, as public officials, of this State, but to comply with the opinion of the Attorney General of the State of Texas which interprets the Election Laws.

The most recent opinion in this regard by the Attorney General is numbered C-173 and dated November 6, 1963. [fol. 17] This opinion contains an interpretation of Article VI, Section 2 of the Texas Constitution and its statutory counterparts, Articles 5.01 and 5.02 of the Texas Election Code. It states that the Constitutional provision in question applies to members of the Armed Forces of the United States who entered the service outside the State of Texas. The applicable provision of Article VI, Section 2 of the Texas Constitution states as follows:

> ". . . Any member of the Armed Forces of the United States, or component branches thereof, or in the military service of the United States, may vote only in the County in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

In interpreting this provision, the Attorney General's opinion contains the following statements:

> ". . . It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and can not affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.
>
> ". . . As we view it, the purpose of the restriction is to prevent a concentration of military voting strength in locations where military installations are situated, which 'might well lead to complete domina-

[fol. 18] tion and control of local politics by the overwhelming number of military men to the prejudice of the civilian citizens of the community.' Interpretative commentary under Art. VI, Sec. 1, Vernon's Ann. Tex. Const., Vol. 2, P. 336. The concentration sought to be prevented could come about from voting by former residents of other states as readily as from voting by former residents of other counties in this State. We fail to see the rationale for allowing a resident of some other state who is stationed at Fort Bliss to acquire a voting residence in El Paso County, while denying that privilege to a resident of Texas; . . .'

"We are not impressed by the suggested explanation that the person who resided in Texas at the time of entering service does have a place to vote in Texas (i. e., the county of his residence at the time of his entering service), but the person who resided in some other State at the time of entering service would have no place to vote in Texas if he could not acquire a voting residence at the place where he was stationed. The 1954 Amendment evinces an intention to remove the disfranchisement of active members of the regular military establishments, but subject to the limitation that they will not be allowed to acquire a new voting residence in this State while in the military service. It does not show an intention to enfranchise any person or class of persons in military service on any other terms. It should be kept in mind that a person who enters military service as a resident of some other State gives up his voting residence in that State only by his own volition. . . . If he loses his residence and voting privileges at the place where he resided when he entered service, it is by his own desire to acquire a new residence at a different place. . . ."

In view of this opinion, numbered C-173, as stated above, and in view of the former opinions of the Attorney General numbered S-148 and WW-157, dated December 18, 1954 and July 8, 1957, respectively, Mrs. Margaret

Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified [fol. 19] voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered military service.

By reaching these conclusions, we do not mean to infer that we agree with the opinion of the Attorney General of the State of Texas. In order to make the record clear, we believe that the Attorney General's office has misconstrued the purpose and intent of Article VI, Section 2 of the Texas Constitution. However, as stated above, we have no choice but to abide by these opinions as public officials of this State. Please make it clear to Sergeant Carrington that we regret deeply the action that we have taken, but hope that a future clarification of this problem will be made so that Sergeant Carrington and other members of our fine military establishment will be permitted to vote in this State in the future. Thank you for your attention and consideration.

Sincerely,

/s/ Alan V. Rash
ALAN V. RASH
County Chairman

AVR:hb

cc: Mrs. Margaret Hockenberry
3502 Capella Street
El Paso, Texas

[fol. 20] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 21] IN THE
SUPREME COURT OF TEXAS

Austin, Texas

[Title Omitted]

[File Endorsement Omitted]

ANSWER OF RESPONDENTS—Filed April 17, 1964

TO THE HONORABLE SUPREME COURT:

Now come Respondents ALAN V. RASH and MARGARET HOCKENBERRY and file this their answer to Relator's Petition for Writ of Mandamus.

[fol. 22] I.

Respondents admit the facts alleged in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of Relator's Petition for Writ of Mandamus. Respondents specifically admit that Relator meets all of the requirements necessary to become a qualified elector in El Paso County, Texas, except for the fact that he is a member of the United States Army and entered the military service while residing in Alabama.

II.

In reply to Paragraphs XI, XII, XIII, and XIV of the Petition for Writ of Mandamus, Respondents say that it is their opinion that the Attorney General's interpretation of Article VI, Section 2, of the Constitution of the State of Texas is incorrect and totally inequitable and that Relator should not be denied the privilege of voting solely because he is a member of the United States Army and entered the military service while residing in Alabama. Respondents firmly believe that no one otherwise qualified to vote should be denied that privilege merely because of current service in the Armed Forces of the United States, regardless of where he or she entered the service.

[fol. 23] Nevertheless, because the Attorney General's opinion is presently the most authoritative ruling on the

Constitutional provision in question, Respondents feel compelled to, and indeed positively will, abide by such opinion and interpretation and, accordingly, will not recognize Relator as a qualified elector in El Paso County so long as he remains in the military service, unless the Supreme Court rules otherwise.

Respondents are currently preparing to conduct the Republican Primary in El Paso County on May 2, 1964. It is of the utmost importance that an early decision be reached by the Court in order that Respondents and all other similarly situated in the State of Texas may determine the proper course to take regarding Relator and others like him similarly situated. Therefore, Respondents urge the Court to decide the issues raised by Relator at the earliest possible time.

/s/ Tad R. Smith
TAD R. SMITH
1500 First National Bldg.
El Paso, Texas
Attorney for Respondents

[fol. 24] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 25] [File Endorsement Omitted]

[fol. 26] IN THE
SUPREME COURT OF TEXAS

[Title Omitted]

ANSWER OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS—Filed April 21, 1964

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes Respondent WAGGONER CARR, as Attorney General of the State of Texas, and files this his answer to Relator's Petition for Writ of Mandamus.

I.

Respondent does not deny or question the truth of the facts alleged in Paragraphs I, II, III, IV, V, VI, VII, and VIII of Relator's petition.

II.

In opposition to Relator's petition, Respondent asserts [fol. 27] that Relator is not a qualified voted of the State of Texas, and that he will not be a qualified voter and eligible to vote in the Republican primary election to be held on May 2, 1964, if he is on active duty as a member of the Armed Forces of the United States on that date.

III.

Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter. Respondent does not deny that Relator was liable for payment of the poll tax levied for the year 1963 or that upon payment he was entitled to a receipt therefor, but Respondent asserts that issuance of a poll tax receipt to Relator stating on its face that it is to be used for voting in the year 1964 has not conferred any right of privilege of suffrage upon him.

IV.

Respondent asserts that by virtue of the provision in Article VI, Section 2 of the Constitution of Texas which was added by amendment in 1954, Relator is precluded from becoming a qualified elector of the State of Texas during the time that he continues in military service. This provision reads:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

[fol. 28]

V.

Respondent asserts that the withholding from Relator of the privilege to vote in this State does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or any other provision of that document, and that the provisions of Article VI, Section 2 of the Texas Constitution and of Article 5.02 of Vernon's Texas Election Code which Relator attacks in this suit are valid.

WHEREFORE, Respondent prays that the writ of mandamus be denied and that all costs of this proceeding be adjudged against Relator.

WAGGONER CARR
Attorney General of Texas

MARY K. WALL
Assistant Attorney General
of Texas

P. O. Drawer R
Capitol Station
Austin, Texas 78711
Attorneys for Respondent

[fol. 29] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 30]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

No. A-10104

SERGEANT HERBERT N. CARRINGTON, RELATOR

v.

ALAN V. RASH ET AL., RESPONDENTS

ORIGINAL MANDAMUS PROCEEDING

OPINION—delivered April 29, 1964

This proceeding presents for decision the question of whether a nonresident at the time of entering the regular military service of the United States can acquire a voting residence in Texas so long as he is in the military service. We hold that he may not.

Relator, Herbert N. Carrington, is a sergeant in the United States Army. He entered the military service in 1946, at which time he was a resident of Alabama. He has been stationed at White Sands, New Mexico, and has resided in El Paso County, Texas, since February, 1962. He has purchased a home in El Paso, pays taxes in El Paso, registers his automobile in El Paso, and has purchased a poll tax in El Paso. He says that El Paso County is his legal residence, and we assume that such is the case.

Relator desires to vote in the Republican Party Primary Election to be held on May 2, 1964. Respondent, Alan V. Rash, is Chairman of the Republican Party Executive Committee of El Paso County and the Respondent, Margaret Hockenberry is the Presiding Judge of the precinct in which Relator would vote. These Re-

spondents have informed Relator that he will not be [fol. 31] permitted to vote because of the opinion of the Attorney General of Texas, dated November 6, 1963, holding that a former nonresident in the position of Relator may not vote in Texas.

Prior to 1954, and for over a hundred and twenty years, the Constitution of Texas disqualified members of the regular military establishments of the United States from voting in this state. This included both native residents and former nonresidents. Pursuant to proper legislative action, there was submitted in 1954, and adopted by a vote of the people, an amendment to Suffrage Article VI of the Constitution of Texas. As relevant here, this amendment for the first time enfranchised members of the regular military forces of the United States to the following extent:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military services of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The self-evident purpose of the amendment to the Constitution was to prevent a person entering military service as a resident citizen of a county in Texas from acquiring a different voting residence in Texas during the period of his military service, and to prevent a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service. Relator argues that the intent of the 1954 amendment was to enfranchise all members of the Armed Forces but to restrict only the voting residence of those individuals entering the military service from Texas to the county of their residence; in other words, says Relator, a former nonresident may choose and [fol. 32] change his voting residence in Texas, a privilege denied to original residents of Texas. We do not regard this as a reasonable or plausible construction of the amendment. To so narrowly construe the amendment would be inconsistent with the history of the provisions

of the Texas Constitution with respect to the exercise of suffrage by persons in military service. As before mentioned, no member of the regular military establishments could vote in Texas prior to the 1954 amendment, and it is not reasonable to say that the Legislature in submitting the amendment, and the people in their favorable vote thereon, intended to free from all restrictions based on military service those persons who had entered such service as residents of another state, but to restrict those persons entering military service as residents of Texas to the right to vote in the county in which they resided at such time. Such a construction would, in effect, create a discrimination against residents of the state. Moreover, the very purpose of the disfranchisement of military personnel for so long, and the obvious purpose of restricting the vote of a Texas resident to the county in which he resided at the time he entered the military service, was to prevent a concentration of military voting strength in areas where military bases are located. This basic purpose and policy would be frustrated if individuals in the military service who were former residents of another state could choose and change their voting residence while stationed in Texas.

Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military or-
[fol. 33] ders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class.

Both the original resident and former nonresident lose the right to vote in Texas upon a change in their legal residence after entering the military service. The nonresident voluntarily gives up his right to vote in his original state of residence by changing his legal residence to Texas. The resident voluntarily gives up his right to vote by changing his legal residence to another county in Texas.

This is not to say that the Texas Constitution purports to, or can, restrict the voting rights of persons in other states. Texas cannot, of course, extraterritorily regulate or limit the voting residence of a person entering the military service as a resident of another state so long as such person remains a citizen of the other state. The Texas Constitution can, however, declare the policy that the enfranchisement of a person in military service shall be limited to the exercise of suffrage in the county in which the person resided at the time of entering the [fol. 34] service. The effect on former nonresidents is that they may not acquire a voting residence in Texas; the effect upon original residents is that they may not change their voting residence from one county to another.

This construction does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in its provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. Involved is the question of the reasonableness of the classification; or, to express it otherwise, there is involved the question of whether the 1954 amendment as so construed results in a discrimination which offends the Federal Constitution. The Supreme Court of the United States has long recognized that "the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution. . . . *A State, so far as the Federal Constitution is concerned, may provide by its own Constitution and laws that none but native-born citizens shall be permitted to vote*, as the Federal Constitution does not confer the right of suffrage

upon any one, and the conditions under which that right is to be exercised are matters for the State alone to prescribe, subject to the conditions of the Federal Constitution, already stated. . . ." (Italics are added) Pope v. Williams, 193 U. S. 621, 632, 633, 24 S. Ct. 573, 4 L. Ed. 817. The case involved a Maryland statute which provided that a nonresident coming into the state to reside must have filed a declaration of intent so to do a year before [fol. 35] he should have the right to be registered as a voter in the state. The statute was unsuccessfully attacked as violating a federal right of the new resident of Maryland.

Later, in 1959, The United States Supreme Court reaffirmed the foregoing principles, saying:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, . . . absent of course the discrimination which the Constitution condemns. . . . So while the right of suffrage is established and guaranteed by the Constitution . . . it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . We do not suggest that any standards which a state desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction." Lassiter v. North Hampton Board of Elections, 360 U. S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

The Supreme Court in this case sustained a statute of North Carolina which required that prospective voters be able to read and write in the English language any section of the Constitution of the state.

In Gray v. Sanders, 373 U. S. 368, 83 S. Ct. 801, 9 L. Ed.2d 821 [holding that Georgia county unit system violated the equal protection clause of the Fourteenth Amendment] the Court reaffirmed the principle that "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is

used as an instrument for circumventing a federally protected right."

We do not believe that a resident of another state upon entering the military service possesses a "federally protected right" to vote in Texas elections while in the mili-
[fol. 36] tary service in whatever county or district in Texas to which he may elect to change his voting residence. The provision of the Texas Constitution under review does not result in the loss of the right of the nonresident to retain his voting privileges under the laws of the state of his residence when he entered the service; its effect is only that a resident of another state entering military service cannot later give up his former residence, and with it the right to vote in such state, and thereupon, while in the military service, acquire a voting residence in Texas.

The petition for writ of mandamus is denied.

ZOLLIE STEAKLEY
Associate Justice

Chief Justice Calvert and Associate Justice Smith dissenting.

Opinion delivered

April 29, 1964.

[fol. 37] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 38]

* * * *

DISSENTING OPINION—delivered April 29, 1964

This is an original petition for writ of mandamus filed by Relator, Herbert N. Carrington, to compel respondents to determine whether or not Relator is a qualified elector for the purpose of voting in the Republican party primary to be held on May 2, 1964, without taking into consideration the fact that he is a member of the United States Army and entered the military service while residing in Alabama. Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican party Executive Committee of El Paso County, Texas, and Honorable Margaret Hockenberry, the "presiding judge" who will conduct the Republican party primary election in Precinct No. 16 of El Paso County, Texas.

Relator is a Sergeant in the United States Army. He entered the service in 1946, when he was a resident of Jefferson County, Alabama, and has been continuously in the military service since that time. It is undisputed that Relator is at present a resident of El Paso County, Texas, where he and his family have resided since February, 1962. He has designated El Paso, Texas, as his permanent home for all purposes on his military records, has paid ad valorem taxes and will pay such taxes in the future to the City of El Paso and to the County of El Paso, and has shown on his federal income tax return that he resides in El Paso, Texas.

On December 17, 1963, Relator paid the poll tax levied for the year 1964 to the County Tax Collector of El Paso County, Texas. Thereafter, on March 18, 1964, Relator wrote a letter to Respondent Rash, asking whether or not Relator would be allowed to vote in the Republican party [fol. 39] primary election to be held on May 2, 1964. Respondent Rash, in his capacity as Chairman of the Republican party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "presiding judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered military service."

In 1954 the following amendment was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Articles 5.01 and 5.02 of the Texas Election Code restate, in effect, the law as contained in the above amendment.

Prior to Relator's correspondence with the Respondents, Rash and Hockenberry. the Respondent Attorney General, in an opinion, had interpreted the above amendment and its statutory counterparts. In interpreting these provisions, the Attorney General's opinion stated in part:

> ". . . It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and can not affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering service, and if at that time he did not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service."

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Relator as a qualified voter.

Relator first contends that the Attorney General's interpretation of the above-quoted Constitutional provision [fol. 40] is incorrect. It is Relator's position that the provision was not intended to apply to members of the Armed Forces who were *not* residents of the State of Texas at the time they entered the military service, but who are now residents of Texas. Instead, Relator contends that the Constitutional amendment was intended to apply only to servicemen who resided in Texas when they entered the service.

Relator next argues that if the Constitutional amendment in question does apply to persons who resided in Texas and those who resided elsewhere at the time of entering service, then the amendment constitutes an unlawful discrimination *within the class* of military personnel; and, therefore, violates the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. Relator bases this argument upon the theory that the Constitutional amendment, if applied to all military personnel, discriminates against those servicemen who were *not* residents of Texas at the time of entering the service. To illustrate this alleged discrimination, Relator argues that a serviceman such as himself, who enters the Armed Forces in another state, and thereafter establishes his residence in Texas, is deprived of the right to become a qualified voter in any election so long as he resides in Texas and remains a member of the Armed Forces. This is so because when he acquires a new residence in Texas, he loses his voting privilege at the place where he resided when he entered service, and he cannot meet the residence requirements of Texas. Therefore, he is left without a place to vote. On the other hand, Relator argues that the Constitutional provision in question does not so deprive a serviceman, who was a resident of Texas at the time he entered the Armed Forces, of his right to vote. According to Relator, a serviceman who resides in Harris County, Texas, at the time he enters the Armed Forces, and who thereafter changes his legal residence to El Paso County, Texas, can still remain a qualified voter

in Harris County. Thus, Relator concludes the Constitutional provision unlawfully discriminates within the class of military personnel.

[fol. 41] Respondents argue that the provision in Article VI, Section 2, of the Texas Constitution was intended to apply to persons who were not residents of Texas at the time of entering service, *and* to persons who were Texas residents. Respondents further contend that this provision does not violate the Fourteenth Amendment of the United States Constitution because *regardless of* where a serviceman resided at the time of entering service, if he changes his legal residence while in service in Texas, he relinquishes his right to vote anywhere.

In my opinion, a determination of this proceeding does not rest upon whether or not the Constitutional provision under attack unlawfully discriminates *within* the class of military personnel, as contended by Relator. Even assuming that it does not, as Respondents so argue, this still does not settle the ultimate constitutional problem as to whether a state may segregate *all* persons in military service as a class, which class is to be treated differently from other persons in regard to the right to vote. In my opinion, such a distinction is arbitrary and unreasonable, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

I fully recognize that the Federal Constitution, or any of its amendments, does not give to a person the privilege to vote in any state. See Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627. It is clear that the privilege to vote in a state is within the jurisdiction of the state itself, "to be exercised as the state may direct. . . ." Pope v. Williams, 193 U. S. 621 (1904). In fact, the Federal Constitution makes voters' qualifications rest on state law even in federal elections. Art. 1, § 2. However, in exercising its broad powers to determine the conditions under which the right of suffrage may be exercised, the state cannot impose standards which the United States Constitution condemns as discriminatory. See Lassiter v. Northampton County Board of Elections, 360 U. S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

[fol. 42] It is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable. The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest. Thus, without contravening any restriction that Congress has imposed, a state can determine that only those persons who are literate should vote since "[t]he ability to read and write . . . has *some relation* to standards designed to promote intelligent use of the ballot." Lassiter v. Northampton County Bd. of El., supra.

In the present case Respondents contend that the purpose of the Constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial difference between servicemen and other citizens, and thereby confer different voting rights on these classes.

With present day mobility and industrialization, large groups, *other than servicemen*, move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.

Wherein lies the reasonable basis for distinguishing between these groups?

In the recent case of Gray v. Sanders, 372 U. S. 368, 9 L. Ed. 2d 821, 8 S. Ct. 801 (1963), our Supreme Court has said:

> ". . . there is no indication in the Constitution that homesite or *occupation* affords a permissable basis for distinguishing between qualified voters within a state. . . ." (Emphasis added.)
>
> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—

whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever
[fol. 43] their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications* . . ." (Emphasis added.)

In the present case, Relator has proven to the satisfaction of Respondent that he meets the basic qualifications of holding a valid poll tax receipt, and that he meets all of the age and residence requirements for a qualified elector in El Paso County, Texas. The Respondents do not contend that Relator is unqualified to vote because he is immature, or is of unsound mind, or is a criminal or a public charge. Instead, by Respondent's own admission, Relator is unqualified *solely* because he is a member of the Armed Forces, who resides in Texas. Such a "distinction" does not fulfill the test of reasonableness of classification as required by the Fourteenth Amendment of the United States Constitution. Moreover, the considerations which are recited in the majority opinion as affording a sound basis for denying the right to vote to members of the Armed Forces apply only to local elections; but the effect of the majority opinion is to deny the right to vote in *all* elections, even in the election of a President of the United States.

Inasmuch as Article VI, Section 2 of the Texas Constitution violates the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, Relator's petition for writ of mandamus should be granted.

CLYDE E. SMITH
Associate Justice

Chief Justice Calvert joins in this dissent.

Opinion delivered: April 29, 1964

[fol. 44] [Clerk's Certificate to foregoing paper omitted in printing]

[fol. 45]

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

April 29, 1964.

No. A-10104

SERGEANT HERBERT N. CARRINGTON

vs.

ALAN V. RASH ET AL.

Original Mandamus

JUDGMENT—dated April 29, 1964

This cause came on to be heard on petition of relator, Sergeant Herbert N. Carrington, for writ of mandamus, filed herein on April 15, 1964, and said petition, together with the record and briefs and argument of counsel, having been duly considered, because it is the opinion of the Court (Chief Justice Calvert and Associate Justice Smith dissenting) that the writ of mandamus as prayed for should not issue, it is therefore adjudged, ordered and decreed that the petition for writ of mandamus be, and hereby is, in all things denied.

It is further ordered that relator, Sergeant Herbert N. Carrington, pay all costs incurred in this proceeding in this Court.

[Clerk's Certificate to foregoing paper omitted in printing]

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 32, October Term, 1964

SERGEANT HERBERT N. CARRINGTON, PETITIONER

vs.

ALAN V. RASH, ET AL.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747699 319